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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 23.

WILLIAM FOX,

Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

Respondent.

BRIEF OF PETITIONER.

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No. 23.

WILLIAM FOX,

Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

I.

Opinions Below.

The opinion of the District Court for the Southern District of New York has not been officially reported. It was rendered by Bondy, *D. J.*, a Judge of the United States District Court for the Southern District of New York, under date of December 2, 1935 (R. 6). No opinion was written by the United States Circuit Court of Appeals for the Second Circuit in dismissing the appeal from the orders of December 19, 1935, and February 7, 1936.

II.

Jurisdiction of This Court.

1. The jurisdiction of this Court is based upon Judicial Code, Sec. 240 (a) (28 U. S. C., Sec. 347 [a]), as amended by Act of Congress February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938. The petition for certiorari was filed April 6, 1936 and the writ was granted May 18, 1936 (R. 97).

2. The order to be reviewed is an order of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936 (R. 95-96), which dismissed an appeal from two orders of the United States District Court for the Southern District of New York, respectively dated December 19, 1935 (R. 27-30) and February 7, 1936 (R. 54-56).

III.

Statement of the Case.

A judgment in the sum of $297,412.91 was entered by confession in favor of the respondent and against the petitioner in the United States District Court for the Southern District of New York on July 18, 1935. On September 28, 1935, a subpoena in proceedings supplementary to judgment (R. 1), pursuant to Act of Congress June 1, 1872, Ch. 255, Sec. 6, 17 Stat. 197 (R. S. Sec. 916, 28 U. S. C. Sec. 727), Common Law Rule 5 of the United States District Court for the Southern District of New York (as set forth in the Appendix, *infra,* p. 47), and Article 45 of the Civil Practice Act of the State of New

York (L. 1920, Ch. 925, as amended by L. 1935, Ch. 630, in effect September 1, 1935), was issued. On October 8, 1935, the aforesaid subpoena was served upon the petitioner on a railroad train at Frankfort Junction, in the State of Pennsylvania (R. 2), directing his appearance for examination at the courthouse of the United States District Court for the Southern District of New York on a day certain. The petitioner did not appear pursuant to that subpoena (R. 5). Thereafter, the respondent moved to punish the petitioner for contempt, for failure to appear pursuant to the aforesaid subpoena, by order to show cause served upon the petitioner at the Hotel Claridge, in Atlantic City, New Jersey, and returnable to the United States District Court for the Southern District of New York (R. 3-5). The petitioner, appearing specially in the said District Court, contended that the United States District Court for the Southern District of New York did not acquire any jurisdiction over him by reason of the service of the subpoena in the State of Pennsylvania, since the subpoena constitutes the original process commencing the proceedings known as "Proceedings Supplementary to Judgment"; that, therefore, the subpoena and the service thereof were void. The petitioner, therefore, further contended that he should not be punished for the violation of a void subpoena. On December 2, 1935, a decision was rendered upon this motion by Bondy, *D. J.* (R. 6), as follows:

> "The proceedings supplementary to execution (pursuant to Common Law Rule 5 of this Court) were ancillary to the original action in this Court. See *Sherman Bank* v. *Schubert Theatrical Co.*, 238 Fed. 225, 228; they therefore could be instituted by the service of a subpoena outside of

the territorial limits of this district. See *Lerman* v. *Krenther-Arnold Hinge Last Co.,* 284 U. S. 448; 3 Cyc. of Fed. Proc. Sec. 750, and the order to show cause why the defendant should not be punished for contempt could likewise be served beyond the territorial limits of this district. See *Lerman* case, *supra.*

Motion is therefore granted with leave to defendant to purge himself of the contempt by submission to examination. Settle order on notice.

WM. BONDY,
U. S. D. J.

Dec. 2, 1935."

An order was made on December 19, 1935, and entered December 20, 1935, in the United States District Court for the Southern District of New York (R. 27-30), holding that the subpoena had properly been served and further holding the petitioner in contempt. This order provided that the petitioner might purge himself of the contempt by appearing for examination on or before a day certain, and in the interim provided that the question of punishment for the aforesaid contempt would be held in abeyance. The petitioner then filed a petition for appeal to the Circuit Court of Appeals for the Second Circuit, from the order of December 19, 1935 (R. 30). Thereupon an order was made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said order of December 19, 1935 (R. 33). The respondent moved to dismiss the appeal on the ground that the order of December 19, 1935, was not a final order, and, therefore, not appealable (R. 61). The Circuit Court of Appeals, by order dated January 20, 1936, dismissed the appeal, without opinion (R. 80). Thereupon a further order was made by the

United States District Court for the Southern District of New York, under date of February 7, 1936, and entered February 20, 1936 (R. 54-56), imposing the following punishment on the petitioner:

(a) A fine in the sum of $235,082.03, representing the balance alleged to be due and unpaid on account of the judgment;

(b) Directing the petitioner to pay to the attorneys for the judgment-creditor the sum of $10,000 as and for their costs; and

(c) Directing the issuance of a warrant to a marshal forthwith to arrest and imprison the petitioner until he shall have paid the said costs of $10,000 *and* have paid the fine of $235,082.03 or submitted to examination.

An order was then made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said orders of December 19, 1935, and February 7, 1936, to the Circuit Court of Appeals for the Second Circuit (R. 59). A motion was thereupon made by the respondent to dismiss the appeal on the ground that the said orders of December 19, 1935, and February 7, 1936, were not final orders and hence not appealable (R. 81). The Circuit Court of Appeals for the Second Circuit, by order dated March 5, 1936 (R. 95), dismissed the said appeal without opinion.

IV.

Assignment of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in holding that the order of

February 7, 1936, was not a final order and hence not appealable.

V.

Question Presented.

The single question before this Court is the jurisdiction of the Circuit Court of Appeals to review the aforementioned orders of the District Court.

VI.

Summary of Argument.

A.—**The orders of December 19, 1935 and February 7, 1936 constitute a final decision within the meaning of Section 128 of the Judicial Code, because they affected a substantial right of the petitioner in so far as they ordered the immediate payment of $10,000 to the attorneys for the respondent, from which order there can be no adequate relief except by an appeal at this time.**

B.—**The orders of the United States District Court for the Southern District of New York, dated December 19, 1935 and February 7, 1936, constitute a final decision because they order the immediate payment of money.**

C.—**In a case in which the District Court has neither jurisdiction nor power to make an order therein, a "final" order is to be found in the circumstances.**

D.—**The orders of the District Court, dated December 19, 1935, and February 7, 1936, punished this petitioner for contempt of court. In a similar**

case in which the contention that the District Court lacked jurisdiction was presented, the Circuit Court of Appeals reversed the order on the merits without questioning its finality.

E.—As the orders of the District Court, dated December 19, 1935, and February 7, 1936, are dual in nature, being final as to the $10,000 ordered paid to the respondent's attorneys, the Circuit Court of Appeals has jurisdiction to hear the appeal.

VII.

Argument.

POINT A.

The orders of December 19, 1935 and February 7, 1936 constitute a final decision within the meaning of Section 128 of the Judicial Code, because they affected a substantial right of the petitioner in so far as they ordered the immediate payment of $10,000 to the attorneys for the respondent, from which order there can be no adequate relief except by an appeal at this time.

In the brief in support of the petition for a writ of certiorari granted herein, emphasis was placed upon the fact that the orders of the United States District Court for the Southern District of New York, dated December 19, 1935 (R. 27-30) and February 7, 1936 (R. 54-56) not only adjudged the petitioner in contempt (R. 29), but also (1) directed the petitioner to pay a fine in the sum of $235,082.03, the amount alleged to be due and unpaid on account of the judgment (R. 55), which fine may be avoided by submission of the petitioner to examination (R. 56), and (2)

directed the petitioner to pay to the attorneys for the respondent herein, the sum of $10,000, as and for their costs in this proceeding (R. 56), *which amount must be paid except upon the forfeiture by the petitioner of his liberty* (R. 56), and (3) directed the petitioner be imprisoned until he pays the fine or submits to examination, and in addition, pays the aforesaid sum of $10,000 (R. 56).

It is the contention of the petitioner that the aforementioned orders of the United States District Court for the Southern District of New York constitute a final decision, within the meaning of the Act of Congress of March 3, 1891, Ch. 517, Sec. 6, 26 Stat. 828, as amended February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 936 (Judicial Code, Sec. 128, 28 U. S. C., Sec. 225) which defines the appellate jurisdiction of the Circuit Court of Appeals as follows:

> "(a) *Review of Final Decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or by writ of error final decisions——
>
> "First. In the district courts * * *"

To clarify the issue at the outset, the order of the District Court, dated December 19, 1935, adjudging the petitioner in contempt (R. 27-30), provided that the punishment, costs and disbursements, if any, to be imposed were left open subject to being fixed by supplemental order of the Court (R. 30). The order of the District Court dated February 7, 1936 punishing the petitioner for contempt (R. 54-56) is the supplemental order previously provided for (R. 55). Thus the two orders are in reality a single order, judgment and decision, from which decision an order al-

lowing appeal was granted (R. 59). The order of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936 (R. 95-96), which is now under review by the order of this Court allowing Certiorari (R. 97), dismissed the appeal allowed by the order allowing said appeal (R. 59), reciting therein that the appeal had been allowed from the two orders, respectively dated December 19, 1935 and February 7, 1936 (R. 95). The writ of certiorari granted herein is limited to the single question of the jurisdiction of the Circuit Court of Appeals, and therefore, whether the orders of the District Court constitute a "final decision" is the sole problem now before this Court.

There have been numerous decisions defining appealable orders and the purpose of the rule limiting appeals to orders which are in whole or in some substantial part *final.* In the recent case of *Leonardi* v. *The Chase National Bank of the City of New York* (C. C. A. 2, 1936), 81 F. (2d) 19, the reason for the rule requiring finality is clearly stated by the Court, as follows:

> "* * * The purpose of the rule allowing no appeal from interlocutory orders is merely to prevent the case coming up piecemeal, not to cut off altogether appeals from certain types of orders" (p. 20).

The petitioner contends that an appeal from the orders of the District Court, dated December 19, 1935 and February 7, 1936 would not violate the rule as set forth in the *Leonardi* case, *supra.* The orders clearly determine that the petitioner is to pay to the attorneys for the respondent the sum of $10,000 within eight (8) days after the service of the order

(R. 56). There is no provision withholding the said sum, pending any appeal or other determination of the proceeding supplementary to judgment; if an appeal were not permitted at this stage of the proceedings, it would in effect penalize the petitioner by ordering his arrest and imprisonment unless he were unconditionally to hand over the sum of $10,000 in cash without any assurance that the District Court had properly determined that it had jurisdiction to so command.

The petitioner maintains that this involved a substantial right within the doctrine laid down by cases decided not only by this Court, but also in the Circuit Court of Appeals for the Second Circuit, as well as by Circuit Courts of Appeals in other circuits.

The doctrine is well stated in the case of *Odell* v. *H. Batterman Co.* (C. C. A. 2, 1915), 223 Fed. 292, in which case the District Court entered an order which denied a landlord's request for permission to commence an action of ejectment in the Supreme Court of the State of New York against the receivers of its tenant. The Circuit Court of Appeals for the Second Circuit, held that the order was a final order because

> *"Under the decisions an adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal"* (p. 295). (Italics ours.)

It cannot be said that there would be adequate relief in regard to the $10,000 ordered paid to the attorneys of the respondent, by an appeal which must be postponed until the proceedings supplementary to judgment were terminated, according to Sec. 802 of the Civil Practice Act of the State of New York,

Laws of New York 1935, Ch. 630, §1, p. 1276 (see Appendix, p. 48, *infra*), as suggested by the respondent in its brief in opposition to the writ of certiorari, at page 6 thereof. Under this statutory provision this supplementary proceeding may never terminate. The only relief possible in this case is by an immediate appeal from these orders. If not, the District Court becomes not only the court of first instance, but also that of last resort, determining a right so substantial that it deprives the petitioner of his liberty unless he submit to the will of the District Court and pay out $10,000 of his funds, by order of said court.

The same doctrine was reiterated in *Chief Consol. Min. Co.* v. *Mammoth Min. Co.* (C. C. A. 8, 1928), 29 F. (2d) 703, in which the Court held:

> "'A final order is one which determines a substantial right against a party in such a manner as leaves him no adequate relief except by appeal.' *Odell* v. *Batterman Co.* (C. C. A. 2), 223 F. 292; *American Brake Shoe and Foundry Co.* v. *New York Rys. Co.* (C. C. A. 2), 282 F. 523.
>
> *And this is true irrespective of final decree in the main litigation* (citing cases)" (p. 705). (Italics ours.)

Likewise, in *Rector* v. *United States* (C. C. A. 8, 1927), 20 F. (2d) 845, 872, after a very careful and well considered analysis of finality, the court concluded:

> "* * * *It is certain that an order is final and appealable if it is of a character which settles substantial rights; which makes no reservation as to its effect; which is designed to be operative in a way affecting such rights at once or before or irrespective of the final decree in the main litigation.* With this conception of finality in mind, we proceed to test thereby these orders reducing royalties." (Italics ours.)

Clearly the definition hereinabove set forth in the *Rector* case is applicable to the present proceeding. Not only has the District Court determined that the attorneys for the respondent have judgment for $10,000, enforceable by body execution, but the court has made this judgment unconditionally and without reservation, designed to be operative within eight days regardless of the outcome of the proceedings supplementary to judgment.

Analogous to proceedings supplementary to judgment, in view of the possible length of time they might continue because of Sec. 802 of the New York Civil Practice Act, Laws of New York 1935, Ch. 630, §1, p. 1276, are cases involving receiverships.* It often happens that a receiver must act forthwith and yet the receivership is far from its termination. Need the aggrieved receiver or creditor wait months or perhaps years before he may appeal an alleged erroneous determination of the District Court? The Circuit Court of Appeals for the Second Circuit recently answered this question in *West* v. *Radio-Keith-Orpheum Corporation* (C. C. A. 2, 1934), 70 F. (2d) 621, having before it an appeal from an order of a District Court, granting a receiver's petition for instructions, authorizing the modification of an agreement between defendant Radio Corporation of America and others, from which order the Broadway & 47th Street Corporation appealed. The court, having before it this ever-present question of the finality of orders, held as follows:

"We think too that the order is 'final'. At

* A receiver in these proceedings supplementary to judgment has been appointed by order of Judge Paterson, *U. S. D. J.*, dated April 16, 1936, which receivership is based upon the validity of the service of the subpoena involved herein.

least it authorized the receiver, acting through his control over the subsidiaries, to mortgage new films for the money which the companies got back from the note holders. *No further order was necessary to that end; the receiver would at once act upon the leave then granted.* * * * *The creditors, though their interest was indeed indirect, were therefore concluded, and could get no relief except by appeal.* * * *.

"It is impossible to find a decision quite on all fours. * * * we went much further to entertain an appeal in *American Brake Shoe Co.* v. *N. Y. Railways,* 282 F. 523, than we need here. The variants are too numerous to catalogue; they are set out at length in *Rector* v. *U. S.* (C. C. A.) 20 F. (2d) 845, 860-871 (C. C. A. 8); and it must be owned that when all is said, it is not very plain just what are the 'substantial rights' that a 'final' order must settle. Among the nearer of the decisions in the Supreme Court are *Trustees* v. *Greenough,* 105 U. S. 527, 26 L. Ed. 1157 and *Williams* v. *Morgan, supra,* 111 U. S. 684, 4 S. Ct. 638, 28 L. Ed. 559, which touched allowances, and *In Re Farmer's Loan and Trust Co.,* 129 U. S. 206, 9 S. Ct. 265, 32 L. Ed. 656, and *Central Trust Co.* v. *Grant Locomotive Works,* 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97, which concerned interlocutory proceedings in a receiver's administration. See also *Guarantee etc. Co.* v. *Philadelphia, etc. R. R. Co.,* 69 Conn. 709, 714, 38 A. 792, 38 L. R. A. 804" (p. 624). (Italics ours.)

In *Gas & Electric Securities Co.* v. *Manhattan & Queens Traction Corporation* (C. C. A. 2, 1920), 266 Fed. 625, appeal dismissed (1923), 262 U. S. 196, the Circuit Court of Appeals for the Second Circuit

approving and reiterating the doctrine of *Odell* v. *H. Batterman Co., supra,* stated:

> "The injunction meant the end of the matter so far as the particular judge who issued it was concerned, except that it did not include a change of mind on his part. The order goes just as far and lasts just as long as the District Court is possessed of any authority to issue it, and is therefore 'final' and therefore appealable within the six months period. It is clearly a final order within the rule laid down by this Court in *Odell* v. *H. Batterman Co.,* 223 Fed. 292, 295, 138 C. C. A. 534, 537. In that case the Court below entered an order which denied a request to be permitted to sue the receivers in ejectment. This court held the order was a final order from which an appeal could be taken. We said:
>
> 'Under the decisions an adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal. In the suit at bar appellant claims a legal right to immediate possession of the premises, and asserts he is entitled to have that right determined with all reasonable speed. So much of the order appealed from as denied appellant's application was undoubtedly a final order, inasmuch as it definitely and conclusively determined the proceeding which appellant has instituted. *The effect of the order, as we have pointed out, is to leave appellant without relief until the receivership is terminated. When that will be cannot be predicted.* The receivership is a consent receivership and capable of indefinite duration.'
>
> "*We adhere to what was said in the above*

case, and think it decisive of this on the particular matter now under discussion" (p. 633). (Italics ours.)

In *The Farmers Loan & Trust Co., Petitioner* (1889), 129 U. S. 206, this Court granted a writ of mandamus to allow an appeal from an order which determined the rights of parties in a railroad receivership. The order complained of established "certain rights of the parties, to the injury, as petitioners believe, of their interests in the property." This court, with reference to that proposition, held:

"These views we do not propose to elaborate, further than to say that if this order does not give the lender of the money such prior lien upon the proceeds of the property of the company it is because the court had no authority to make it, and as it would be a fraud upon such lender justice could only be done by enforcing it. If this view of the subject be correct, of which we entertain no doubt, *the order is a final one.* It is a decree fixing upon the property, on which the trust company now has a first lien, another lien of $120,000, and making it paramount to that. It changes the relation of that company to this property, displaces its rights as settled by a decree now pending in this court, and if that decree is affirmed, it in effect modifies it, although this court may say that it should stand and be enforced. *This order comes within all the elements of finality which we can imagine to belong to a decree of the Circuit Court. It establishes certain rights of the parties, to the injury, as petitioners believe, of their interests in the property.*

"We need not refer to cases on the subject of finality, for they are numerous, and the principles on which they have been decided apply to

widely varying circumstances. But while we are not aware of any case precisely in point to the one before us, we are satisfied that it is within the purpose of the statute and the principles by which it is to be construed.

"The other reason given why the appeal should not be granted is that the action of the Circuit Court in the case is one within its discretion. All we have to say upon this subject is, that if it be an authority vested in the judges of the Circuit Court, it must be exercised and governed by the principles of a judicial discretion, and the very point to be decided upon an appeal here is, whether they had such discretion, and whether they exercised it in a manner that cannot be reviewed in this court.

"*The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all,* after the case has been removed from its jurisdiction into this court by an appeal accompanied by a supersedeas, *is itself a proper matter of review; and still more, whether, in the exercise of what the court asserts to be its discretionary power, it has invaded established rights of the petitioners in this case, contrary to law, in such a manner that they can have no relief except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order.* * * * In granting the appeal this court, of course, does not undertake to decide whether the order was rightfully made, if the court had the requisite power, but can only do that upon the hearing of the appeal" (pp. 214, 215, 216). (Italics ours.)

The petitioner, therefore, submits that the orders adjudging him in contempt and directing him to pay

the sum of $10,000 without qualifications and further fining him the sum of $235,082.03 with leave to purge himself by appearing for examination in proceedings supplementary to judgment, constitute an order, which in the language of the decisions above quoted, finally determines a substantial right of the petitioner, leaving him no adequate relief except by an appeal at this time (as in the receivership cases), and therefore the Circuit Court of Appeals for the Second Circuit was in error in dismissing the appeal by order dated March 5, 1936.

POINT B.

The orders of the United States District Court for the Southern District of New York, dated December 19, 1935 and February 7, 1936, constitute a final decision because they order the immediate payment of money.

A proposition somewhat similar to that involved in the instant proceeding was decided by the Circuit Court of Appeals for the Second Circuit in *American Brake Shoe and Foundry Co.* v. *New York Rys. Co.* (C. C. A. 2, 1922), 282 Fed. 523, appeals dismissed for want of jurisdiction (1923), 262 U. S. 736, in which the Circuit Court of Appeals stated:

> "An adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal. [Citing *Odell* case.] *If the petitioners have a right of immediate payment, the orders must be regarded as a determination and denial of a substantial right, and which leaves no adequate relief, except by recourse to an appeal. As*

such we have a right to review them" (pp. 527, 528). (Italics ours.)

As to the $10,000 ordered paid to the respondent's attorneys within eight (8) days, there can be no question but that the immediate payment ordered is comparable to the right of immediate payment which the appellants claimed in *Amer. Brake Shoe and Foundry Co.* v. *New York Rys. Co., supra,* and in that case, the Circuit Court of Appeals for the Second Circuit allowed the appeal.

Again, the same court in *Habirshaw Electric Cable Co.* v. *Habirshaw Electric Cable Co., Inc., et al.* (C. C. A. 2, 1924), 296 Fed. 875, certiorari denied (1924) 265 U. S. 587, denied a motion to dismiss an appeal for want of jurisdiction in a case in which there was a mandatory order, "forthwith to return and deliver" claims and securities held by the appellants. The court there stated:

> "Courts seek not to mistake form for substance. Nothing could be more characteristically final than a mandatory order 'forthwith to return and deliver' the claims and securities referred to. * * *.
>
> "Whether we view the second part of this order as a mandatory injunction or as a final order under section 128 of the Judicial Code (Comp. St. § 1120), the result is the same. It will suffice to refer to *McCall* v. *Bladworth, et al.* (C. C. A.) 290 Fed. 365; *The Flush* (C. C. A.) 277 Fed. 25" (p. 878).

It is submitted that the instant question was ably answered in *City of Eau Claire* v. *Payson* (C. C. A. 7, 1901), 107 Fed. 552. In that case there was a motion to dismiss an appeal on the ground that the order

directing the city to pay the sum of $1600 to the receiver of the Eau Claire Waterworks Company was not final. Denying the motion, the court held:

> "That the order was appealable there should be no serious doubt. *To the extent of the payment required, it was essentially a final decree. It was made without jurisdiction over the party affected, compelled the immediate surrender of a large sum of money, and made no provision for its safekeeping or return in case a return should be found necessary.* * * * The supreme court has not placed upon the words 'final decree', respecting the right to appeal, a strict and technical sense, but has given them a liberal and reasonable construction (citing cases)" (pp. 556, 557). (Italics ours.)

Is this not what has happened by the orders of the District Court dated December 19, 1935 and February 7, 1936? The petitioner has always claimed a lack of jurisdiction of the party affected, the immediate surrender of $10,000 has been compelled and there is no safeguard in case a return should be found necessary.

In *In re Michigan Central Railroad Co.* (C. C. A. 6, 1903), 124 Fed. 727, a writ of mandamus to compel the allowance of an appeal was granted in a case in which there was a petition by the Clerk of the United States Circuit Court for the Eastern District of Michigan for compensation for receiving, keeping and paying out all moneys under order of the court, etc. The district court ordered the railroad company to pay to the said clerk the sum of $2,710.85 "as prayed, and that said petitioner have execution therefor". A petition praying for an appeal having been denied, the

company prayed for a writ of mandamus. The court in granting said writ, held:

> *"That the decree was final, we have no doubt. It finally settles the liability of the petitioner to pay to W. S. Harsha, as clerk, the sum of $2,710.85, and directs execution to issue therefor. It was upon a matter distinct from the general subject of the litigation. Trust Co.* v. *Grant Locomotive Works,* 135 U. S. 207, 224, 10 Sup. Ct. 736, 34 L. Ed. 97. *Nothing remains to be done but to collect and pay out the money. An affirmance here will end the matter forever. Such a decree is final, so far as to be appealable* (citing cases). * * * When this decree is executed, it is a complete end of the whole claim for commissions or compensation, so far as the same had accrued and was presented by the intervention of Harsha" (pp. 730, 731).
>
> "Nor is it essential to the right of appeal that the allowance shall be made from a fund in court. If there is no fund, and the court undertakes to provide one by pronouncing a decree against one of the parties to the proceeding, and directs execution to issue, every reason exists for allowing a review which could possibly exist when an allowance is made out of a fund in which the appealing party has only an interest.
>
> "The conclusion we reach is that the appeal prayed was wrongfully denied" (p. 734). (Italics ours.)

In the proceeding at bar, the order not only directed the payment of $10,000, but also directed a body execution to issue therefor (R. 56). Thus, these cases are parallel with respect to the point at issue.

In *Jacksonville, T. & K. W. Ry. Co. et al.* v. *American Const. Co. et al.* (C. C. A. 5, 1893), 57 Fed. 66,

the Circuit Court for the Northern District of Florida ordered the receiver of the defendant to pay petitioners, attorneys for the complainant, a fee of $5,000 out of the funds on hand, arising from the operation of the railroad properties which had been included in an order appointing the receiver.

When the receiver appealed, the appellee moved to dismiss said appeal, which motion was overruled, the court holding:

> "A decree by a circuit court of the United States, directing that the complainant be paid his costs and expenses out of the fund in court,—the fund in the meantime remaining in the court, in the course of administration,—is, *pro tanto, a final decree,* from which, if the amount be sufficient, an appeal will lie. *Trustees* v. *Greenough,* 105 U. S. 527" (p. 69). (Italics ours.)

See also *Empire Trust Co.* v. *Brooks* (C. C. A. 5, 1916), 232 Fed. 641, certiorari denied, (1917) 243 U. S. 655, in which the court held:

> "The decree was certainly not determinative of the issues presented by the original bill. It did, however, finally determine the issues presented by the intervention of appellee. * * * *we think the decree appealed from, directing the receiver in a foreclosure suit to turn the property over to the receiver appointed by the state court, was final.* * * * The motion to dismiss is overruled. * * *" (p. 642). (Italics ours.)

This court has definitely determined that an order directing a sum of money to be paid, such as in the instant case, is appealable, as far back as 1848, when the case of *Forgay* v. *Conrad,* 6 How. (47 U. S.) 201,

was decided. A motion to dismiss an appeal had been made and in overruling said motion, this court held:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature" (p. 203).
>
> "*And when the decree * * * directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as final to that extent, and authorizes an appeal to this court,* although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed" (p. 204). (Italics ours.)

In 1868, in *Thomson* v. *Dean,* 7 Wall. (74 U. S.) 342, the rule of *Forgay* v. *Conrad, supra,* was reiterated, quoted and followed in denying a motion to dismiss an appeal. This court held:

> "*In this case the decree directs the performance of a specific act, and requires it to be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree of sale. It looks to no future modification or change of the decree*" (p. 345). (Italics ours.)

Thus, in spite of the fact that in addition to the immediate performance of the specific act ordered, accounts were later to be adjusted between the parties, pursuant to a decree settling the question of ownership, the order was held to be *final.*

See also *Stovall* v. *Banks* (1870), 10 Wall. (77 U. S.) 583, in which this Court stated:

> "It cannot be maintained that a decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is not a final decree conclusive on the parties" (p. 586).

The petitioner respectfully urges that this court determine in view of these prior decisions, and in view of the many decisions of the Circuit Courts of Appeal, that the orders of December 19, 1935, and February 7, 1936 are final orders within the doctrine hereinabove set forth, and that the Circuit Court of Appeals for the Second Circuit, by its order of March 5, 1936 decided the question before it contrary to the controlling decisions of this Court and of the several Circuit Courts of Appeal.

POINT C.

In a case in which the District Court has neither jurisdiction nor power to make an order therein, a "final" order is to be found in the circumstances.

This Court in *Phillips* v. *Negley* (1886), 117 U. S. 665, had before it an order of the Special Term of the Supreme Court of the District of Columbia, which had vacated and set aside a judgment in favor of the plaintiff and had granted a new trial *out of term.* An

appeal had been taken to the General Term of the Supreme Court of the District of Columbia, which had dismissed the appeal, having found no error in the Special Term. A writ of error to this Court brought the question of the jurisdiction of the Special Term squarely before it.

At the outset, this Court interpreted the order of the General Term to be a dismissal of the appeal for want of jurisdiction, as the order was not only within the power of the Supreme Court at Special Term, but also a discretionary order. This same argument was advanced in an effort to dismiss the writ of error in this Court.

This Court held that it had jurisdiction to hear the appeal and upon appeal, reversed the proceedings and judgment below on the ground that the District Court had no jurisdiction. With reference to appealability, this Court held:

> *"If, * * *, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this court to entertain the present writ of error, therefore, necessarily involves the jurisdiction of the Supreme Court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself"* (117 U. S. 665, 671, 672). (Italics ours.)

The petitioner contends that the instant question is controlled by the decision in *Phillips* v. *Negley, supra.* He contends, further, that the finality of the orders of December 19, 1935 and February 7, 1936, is depend-

ent upon the power of the District Court to make such orders. This court laid down the doctrine that an order which is predicated upon assumed power and jurisdiction such as the orders now before it *must* be the subject of review by an appellate court. If there can be no appellate review, then in the instant proceeding, it is submitted, this petitioner is deprived of his constitutional rights granted to him by the Fifth Amendment of the Constitution of the United States.

In 1888, a petition for a writ of mandamus to allow an appeal was granted by this court, in *The Farmers Loan & Trust Co., Petitioner,* 129 U. S. 206. In the opinion, one of the grounds for the granting of the writ is found in the following paragraph:

> *"The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all,* after the case has been removed from its jurisdiction into this court by an appeal accompanied by a supersedeas, *is itself a proper matter of review; and still more, whether,* in the exercise of what the court asserts to be its discretionary power, *it has invaded established rights of the petitioners in this case, contrary to law, in such a manner that they can have no relief except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order.* * * * In granting the appeal this court, of course, does not undertake to decide whether the order was rightfully made, if the court had the requisite power, but can only do that upon the hearing of the appeal" (pp. 215, 216). (Italics ours.)

Thus, it seems in so far as the orders appealed from are concerned, this court, despite the limitation

in the writ of certiorari restricting argument to the question of the jurisdiction of the Circuit Court of Appeals (R. 97), *must* inquire into the jurisdiction of the District Court for the Southern District of New York in this proceeding, for under the doctrine of the last two cases cited, it seems clear that the jurisdiction of the appellate court is dependent upon and can only be determined by the primary question of the District Court's power.

The petitioner contends, as he has always contended, that the District Court never acquired jurisdiction by virtue of the service of the subpoena in proceedings supplementary to judgment upon him within the State of Pennsylvania (R. 2).

The jurisdiction of the United States District Court for the Southern District of New York is expressly defined by Congress in Section 97 of the Judicial Code, as amended by Act of Congress July 1, 1922, c. 260, 42 Stat. 812 (Title 28, U. S. Code, Sec. 178). Service of process to commence an action or special proceeding must be effected within its territorial limits. This rule is firmly established and process which is served outside the physical limits of the district is invalid. This court has held in *Munter* v. *Weil Corset Co.* (1923), 261 U. S. 276, and in *Robertson* v. *Labor Board* (1925), 268 U. S. 619, that such process must be served upon the person to whom it is directed within the district. Judicial Code, Sec. 51 (Title 28, U. S. Code, Sec. 112) as amended by Act of Congress March 4, 1925, Ch. 526, Sec. 1, 43 Stat. 1264.

In *Robertson* v. *Labor Board, supra,* this court, stated the jurisdictional limitations of the District Court as follows:

"Under the general provisions of law, a United

States district court cannot issue process beyond the limits of the district, *Harkness* v. *Hyde,* 98 U. S. 476; *Ex Parte Graham,* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland* v. *Sprague,* 12 Pet. 300, 330" (268 U. S. 619, 622).

In the recent case of *Adair* v. *Employers' Reinsurance Corporation* (D. C., N. D. Texas, 1935), 10 F. (Supp.) 725, motions were made by the defendants to quash service of process in an action under the Workmen's Compensation Act of Texas. In granting the motions, the court held:

"A civil suit purely *in personam* may not go forward against a defendant without either a voluntary appearance or the legal service of process at a place where the officer serving it has authority to do so. *A United States District Court cannot issue process beyond the limits of its own district. A defendant cannot be subjected to its jurisdiction in personam by pretended service outside of the district. Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119" (p. 726). (Italics ours.)

Likewise, in *Creager* v. *P. F. Collier & Son Co., et al.* (D. C., S. D. Texas, 1929), 36 F. (2d) 781, a motion to quash the service of a citation was granted wherein process out of the District Court for the Southern District of Texas had been served in the Northern District of Texas, the court holding, as follows:

"Jurisdiction of the federal court over a defendant being special and dependent upon the valid service of process, since the service on the defendant is invalid, because issued to and served

> in another district, it is unnecessary to determine whether the defendant is doing business in the Northern District of Texas, or whether Smalley is its agent there" (p. 783).

A case which is very closely analogous to the instant proceeding, is *New York Indemnity Co.* v. *Rasmusson* (D. C., S. D. Texas, 1932), 1 F. (Supp.) 156, in which a motion to dismiss the action for want of jurisdiction and invalidity of the process and service thereof was granted. The process had been served outside the district but in the district in which the defendants lived. Holding the process void, the court stated:

> "Although a proceeding such as this to set aside an award of the industrial accident board is variously referred to as an appeal, review, etc., such proceeding is in fact a *new suit,* in which *new process,* etc. must issue. Section 5, article 8307, supra. See Articles 1971, 1972, 1973, and 2021, Texas Revised Civil Statutes, 1925, which prescribe how suits are to be instituted. A suit in this court to set aside an award is of the same kind as in the state court, and is by 'Original Process' within the meaning of section 112" (p. 159). (*Italics the court's.*)

It has been the contention of the petitioner throughout, that the proceedings supplementary to judgment are special proceedings, independent of the original action in which the judgment was obtained. As the court in the last cited case said:

> "such proceeding is in fact a *new suit,* in which *new process,* etc. must issue. Section 5, article 8307, *supra.* See Arts. 1971, 1972, 1973 and 2021, Texas Revised Civil Statutes, 1925, which prescribe how suits are to be instituted. A suit in

this court to set aside an award is of the same kind as in the state court, and is by 'Original Process' within the meaning of Sec. 112 [Title 28, U. S. Code, Sec. 112, Judicial Code, Sec. 51, as amended by Act of Cong. Mar. 4, 1925, Ch. 526, §1, 43 Stat. 1264]" (p. 159). (Italics the Court's.)

Just as the Texas Revised Civil Statutes prescribe how suits are to be instituted in the *New York Indemnity Co.* case, *supra,* so does Article 45 of the New York Civil Practice Act, Laws of New York 1935, Ch. 630, §1, pp. 1265-1279, having been adopted by Common Law Rule V of the United States District Court for the Southern District of New York (see Appendix, p. 47), pursuant to Act of Cong. June 1, 1872, Ch. 255, §6, 17 Stat. 197, R. S. Sec. 916 (Title 28, U. S. Code, Sec. 727), determine how proceedings supplementary to judgment are to be instituted. *In the State Court, they are special proceedings, in which new process must issue.* The Federal District Court, sitting in the State of New York and having adopted the state practice as to proceedings supplementary to judgment, must be governed by the same limitations found in the *New York Indemnity Company* case, *supra.* It was, therefore, error for the District Judge to disregard the state statutes in this regard, which are the law of the United States District Court for the Southern District of New York, to the same extent as if Congress itself had expressly passed that legislation.

Fink v. *O'Neill* (1882), 106 U. S. 272, 276;
Custer v. *McCutcheon* (1931), 283 U. S. 514, 516.

The rule is clearly defined in *Ex Parte Boyd* (1881), 105 U. S. 647, 652, thus:

> "It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several states, not only as to the nature and form of writs of execution for the enforcement of judgment, but also as to *all proceedings thereupon.*" (*Italics the Court's.*)

Amy v. *Watertown* (1889), 130 U. S. 301, confirms the rule that the District Court for the Southern District of New York is definitely bound to follow the New York State practice, with reference to supplementary proceedings, and requires that the subpoena which institutes supplementary proceedings must be served in the same manner as the State statute provides for service in a State court proceeding. In that case, this Court held:

> "But the statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading and forms and modes of proceedings, *must* conform to the state law, and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the act of Congress is to be followed in preference to the laws of the State. With regard to the mode of serving mesne process upon corporations and other persons, Congress had not laid down any rule; *and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the*

practice and mode of proceeding in a suit" (p. 304). (Italics ours.)

* * * * * * * *

"Here we are bound by statute; and not by the state statute alone, but by the act of Congress, which obliges us to follow the state statute and state practice. *The Federal Courts are bound hand and foot, and are compelled and obliged by the Federal legislature to obey the state law;* and according to this law the judgment of the Circuit Court was correct and is, therefore, *affirmed"* (p. 320). (Italics ours.)

There remains thus to inquire as to the applicable New York law. Section 773 of the Civil Practice Act, Laws of New York, 1935, Ch. 630, §1, page 1266, defines supplementary proceedings as special proceedings. (See Appendix, *infra*, p. 47.) *Meyers* v. *Consolidated Ice Co.* (1909), 196 N. Y. 471, 473. In *Harris* v. *Weiss* (not officially reported) (1906), 105 N. Y. Supp. 8, 9, is found a detailed statement by the commissioners who drafted the statutory provisions now contained in Article 45 of the Civil Practice Act to the effect that supplementary proceedings and the code provisions were intended to and did set up *supplementary proceedings as separate, independent and original proceedings.*

The Court wherein the judgment was obtained does not, therefore, retain any jurisdiction over the person of the defendant for the purpose of supplementary proceedings by reason of the original service of the summons in the action. A new and independent process must be served in the same manner and to the same extent as a summons in an action in order properly to institute the supplementary proceedings. *Rosen* v. *Polansky* (1923), 121 N. Y. Misc. 395.

Additional support for this proposition is found in the new Article 45 of the New York Civil Practice Act at Sec. 777, Laws of New York 1935, Ch. 630, §1, pp. 1268, 1269, which provides for *instituting* proceedings supplementary to judgment, as follows:

> "Sec. 777. WHERE PROCEEDING AGAINST JUDGMENT DEBTOR INSTITUTED. The proceeding authorized by this article may be instituted in the civil court of record in which the judgment was recovered and in the county where the judgment debtor resides or has a place for the regular transaction of business in person. Where the debtor neither resides nor has such place of business in the county of such court, then the proceeding shall be instituted in the county court or supreme court of the county wherein he resides or has such place of business. If the judge or justice is absent from the county or for any reason unable or disqualified to act, then before a justice of the supreme court or county court or surrogate of such county, or under such circumstances and upon order of such justice of the supreme court or county judge, the examination may be held before any judge or justice of any of said courts in an adjoining county. Where the judgment has been recovered in a court not of record, the proceeding may be maintained in the supreme court or county court as above provided. Where the judgment was recovered in the municipal court of the city of New York, the proceeding shall be instituted in the city court of the city of New York, whether or not any transcript of judgment has been filed in the office of any county clerk."

There can be no doubt that there remains in the court in which the judgment was rendered *no* jurisdiction to commence proceedings supplementary to

judgment without *new process.* Proceedings must be *instituted* either in that court or some other as provided for in Sec. 777. In two instances, the court which rendered the judgment (*i. e.,* if a court not of record, or the Municipal Court of the City of New York), has no jurisdiction to entertain proceedings supplementary to judgment rendered in said court, but such proceedings must be instituted in other courts as provided for in Sec. 777. How then can it be claimed that such proceedings are ancillary to the original action in the court which rendered the judgment?

A special proceeding is distinguished from an action by Sec. 46-a of the New York General Construction Law (Cons. Laws, Ch. 22, 1920), Laws of New York 1920, Ch. 917, §1, p. 2350, as follows:

> "Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

Section 218 of the Civil Practice Act, Laws of New York 1920, Ch. 925, §218, p. 90, provides:

> *"A civil action is commenced by the service of a summons,* which is a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon." (Italics ours.)

Section 403 of the Civil Practice Act, Laws of New York 1920, Ch. 925, §403, p. 149, defines a subpoena as a legal process.

Rule 21 of the New York Rules of Civil Practice (adopted pursuant to Laws of New York 1920, Ch. 902, §1, p. 2263, as amended by Laws of New York

1921, Ch. 370, §1, p. 1166), entitled *"Manner of Service of Papers to Begin a Proceeding"* provides:

> *"The provisions of the statutes and rule relating to the mode of personal service of a summons shall apply to the service of any process or other paper whereby a proceeding is begun in a court,* or before an officer, except a proceeding to punish for contempt, unless other special provision for the service thereof is made by law or rule. Other papers in a proceeding shall be served in like manner as in an action." (Italics ours.)

Section 225 of the Civil Practice Act, Laws of New York 1920, Ch. 925, §225, p. 92, reads as follows:

> "Personal service of the summons upon the defendant being a natural person must be made by delivering a copy thereof *within the state* as follows: * * * to the defendant in person." (Italics ours.)

For further elucidation as to the proper institution of a special proceeding, see *Hill* v. *Hill* (1924), 124 N. Y. Misc. 102, in which the Court held:

> "This is a special proceeding. * * * Service upon the various parties herein has been made in the manner provided for the personal service of a summons. The court, therefore, has acquired jurisdiction of the parties" (124 Misc. 102, 105).

It follows, therefore, that the subpoena which sought to commence the special proceeding, entitled, "Proceedings Supplementary to Judgment" is required to be served within the jurisdiction of the Court in the same manner, exactly, as a summons in an action. And a summons in an action or proceeding *in personam* must be served within the territorial limits

of the Southern District of New York under the controlling decisions of *Robertson* v. *Labor Board,* (1925) 268 U. S. 619 and *Munter* v. *Weil Corset Co.,* (1923) 261 U. S. 276. Proceedings supplementary to judgment are proceedings *in personam. Matter of Maltbie* v. *Lobsitz Mills Co.,* (1918) 223 N. Y. 227, 232, 234, expressly defines supplementary proceedings as "proceedings *in personam* and not *in rem*" and "being a summary proceeding created by statute and in derogation of the common law, must be strictly construed" and which "cannot be enlarged by construction nor by law available or valid, except by strictly following the directions of the act."

In the *Munter* case, *supra,* this Court held:

> "The service on Munter was void. The Distric Court of Connecticut had no power to send its process to New York for service" (p. 279).

Thus, the conclusion is inescapable that the process served in Pennsylvania was of no effect and void and the District Court had no power to adjudge and punish the petitioner for contempt.

The respondent argued in its brief in opposition to the petition for the writ of certiorari, at page 3 thereof, that the Act of Congress, Sept. 19, 1922, c. 344, 42 Stat. 848, Mar. 4, 1925, c. 526, 43 Stat. 1264 (Section 876 of the Revised Statutes, Title 28, U. S. C., Sec. 654), which provides for service of a subpoena upon a witness in a pending proceeding within a hundred miles from the holding of court, applies to the service upon the petitioner herein, and cites for its proposition *Meyer* v. *Consolidated Ice Co.* (D. C., E. D. N. Y., 1908), 163 Fed. 400, claiming it to be "direct authority for this point, and has been followed without question by the bar for twenty-eight

years" (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 3). Even a cursory examination of the *Meyer* case will establish that "the entire proceeding must be dismissed" (163 Fed. 400, 404) because the applicable law of the State of New York did not give the judgment creditor the right to examine a corporate judgment-debtor. Everything else is dicta and has no more standing than a private opinion; surely it is not a binding precedent.

It seems strange indeed that the respondent, when put to the necessity of arguing on the merits for the first time since the argument on the motion which resulted in the opinion of Judge Bondy (R. 6), in its brief in opposition to the petition for the writ of certiorari (p. 3), does not attempt to support the holding of Judge Bondy. Can it be that the weakness in the District Court's position is so manifest that the respondent concurs in the petitioner's belief that the proceeding is not ancillary but original in the sense that new process must issue? The respondent feels the question not sufficiently important to consider (Brief, p. 5) and relies on Sec. 876 of the Revised Statutes (28 U. S. C., Sec. 654) instead of Judge Bondy's conclusion. Therefore, it is incumbent upon the petitioner to meet this argument which the respondent considers the basis of the jurisdiction over the petitioner and the foundation for the power of the District Court to adjudge and punish the petitioner for contempt.

Under the old Article 45, which was expressly repealed by Sec. 1 of Ch. 630 of the Laws of New York, 1935, p. 1265, effective Sept. 1, 1935, at Sec. 773-A, Laws of New York 1932, Ch. 452, §1, p. 995, the following was found:

"* * *. Such subpoena is a process in the name

of the court and may be served in the same manner as a subpoena issued to a witness in an action pending in the court in which such examination is to be had except that the judgment debtor shall not be entitled to receive a witness fee or mileage for attendance."

Had the subpoena in question been served prior to September 1, 1935, it might be arguable that the subpoena served as it was could institute the special proceeding; for at that time Sec. 773-A of the New York Civil Practice Act might have been considered as laying a foundation for the applicability of Sec. 876 of the Revised Statutes. But the legislature of the State of New York in the new Sec. 45, effective Sept. 1, 1935, expressly omitted the provision above quoted from Section 773-A and thus Sec. 783 (see Appendix, p. 48) which governs the manner of service of orders, subpoenas and warrants, is controlling in this case, as the subpoena served upon the petitioner was served after the effective date of the new Art. 45 (R. 2). Thus, all that has been stated as to the service of process to commence a special proceeding constitutes the applicable law on the subject today, and Sec. 876 of the Revised Statutes can have no applicability to the instant proceeding. Furthermore, there was no pending proceeding at the time of the service of the subpoena on the petitioner, for it is the service of this very subpoena upon the petitioner *as a party* which is relied upon as the process instituting the proceeding.

Moreover, R. S. Sec. 876 (28 U. S. C. Sec. 654) provides for service upon a witness who lives within a hundred miles of the courthouse. Although the word "lives" has been interpreted to include a place of temporary sojourn, it has never been extended to include a situation, as here, where service was effected upon a railroad train (R. 2) where the very

act of traveling demonstrates that the place of service was not a place of sojourn.

This contention that, because the District Court had no power in the premises to make the order, said order is "final", has previously been before the Circuit Court of Appeals for the Second Circuit in *Motion Picture Patents Co.* v. *Steiner, et al.* (C. C. A. 2, 1912), 201 Fed. 63. In determining that the order appealed from was appealable, the Court held:

> "We are inclined to think that the order is appealable for the reason that the complainant's contention is not that the court abused its discretion or made an excessive award of costs, but that there is no law permitting such an award. *In re Michigan Central Ry. Co.,* 124 Fed. 727, 59 C. C. A. 643.
>
> "The decree should be reformed as prayed for * * *" (p. 65).

Likewise the same court in *S. M. Hamilton Coal Co.* v. *Watts* (C. C. A. 2, 1916), 232 Fed. 832, Judge Learned Hand, writing for the court which reversed an order vacating a judgment and granting a new trial, held:

> "An order of the character under review, which is equivalent to one setting aside a judgment and granting a new trial, being in the discretion of the court below, is not within the jurisdiction of this court to review. *If, however, the action of the court is beyond its jurisdiction, that question and that alone may be reviewed by writ of error. City of Manning* v. *German Ins. Co.,* 107 Fed. 52, 46 C. C. A. 144; *Phillips* v. *Negley,* 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013" (p. 834). (Italics ours.)

Assuming that Judge Hand is correct in limiting

the review to the sole question of the jurisdiction of the District Court, the petitioner contends that he has not even been accorded that much by that very court in this proceeding.

In *City of Manning* v. *German Ins. Co.* (C. C. A. 8, 1901), 107 Fed. 52, the court as to a similar order, held as follows:

> "* * * An order granting or refusing a new trial, which the court has jurisdiction or power to make is discretionary, and cannot be reviewed by writ of error or appeal in the Federal courts (citing cases). *But the question whether or not the court had the jurisdiction or power to make an order granting or refusing a new trial and avoiding a former judgment is always reviewable in the federal courts by a writ of error or an appeal challenging the order,* BECAUSE IT GOES TO THE EFFECT AND FINALITY OF THE JUDGMENT ITSELF. *Phillips* v. *Negley,* 117 U. S. 665, 671, 675, 678, 6 Sup. Ct. 901, 29 L. Ed. 1013" (p. 54). (Italics ours.)

In *Newton* v. *Consolidated Gas Co.* (1923), 265 U. S. 78, the question raised was the appealability of an order taxing costs. This Court found that in general no appeals were allowed from such orders, as they are within the court's discretion. As the question was not one of discretion, but one of power, this Court held the order was appealable, stating through Mr. Chief Justice Taft, the following:

> "* * * When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are ~~now~~ Not allowed. *But the rule is not absolute and should not be enforced when the trial court assumes the power*

to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. * * * We think the distinction made in that case [*In Re Michigan Central R. R. Co.*, 124 Fed. 727] a sound one and that as the question here is presented, the appeal is a proper one" (pp. 83, 84). (Italics ours.)

POINT D.

The orders of the District Court, dated December 19, 1935, and February 7, 1936, punished this petitioner for contempt of court. In a similar case in which the contention that the District Court lacked jurisdiction was presented, the Circuit Court of Appeals reversed the order on the merits without questioning its finality.

It is elementary that the United States courts are strictly limited to jurisdictional requirements in each case which comes before them. Whether or not objection is made to the jurisdiction of the court, the court on its own motion, if necessary, must be satisfied that it has the requisite jurisdictional facts in the record. This Court has held in *Mansfield C. & L. M. RR. Co.* v. *Swan* (1884), 111 U. S. 379, 382, that "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." This doctrine was recently reiterated in *Mitchell* v. *Maurer* (1934), 293 U. S. 237, in which the court held:

> "*Third.* Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of

> the lower courts in a cause under review. *Mansfield C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382. Hence, the failure of the Insurance Commissioner to claim, in his petition for certiorari, that the order of the District Court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call attention of this Court the lack of diversity of citizenship are immaterial * * *" (p. 244).

Thus, any decision of a Circuit Court of Appeals necessarily presupposes that the requirements of finality have been met. Unless the jurisdictional requirements are present, the Circuit Court will inquire *sua sponte* as to its jurisdiction and dismiss an appeal if the lack of it be found. *Western Electric Co., Inc. et al.* v. *Pacent Reproducer Corp.* (C. C. A. 2, 1930) 37 F. (2d) 14.

The Circuit Court of Appeals for the Second Circuit has already had before it a like case in which the question of finality of a contempt order as to one George M. Laub was not commented upon; yet as the Circuit Court of Appeals reversed the order on the merits, the conclusion is inescapable that there was an appealable order before it.

In *McCall Co.* v. *Bladworth* (C. C. A. 2, 1923), 290 Fed. 365, an injunction had been issued against the defendants in a suit in equity. George M. Laub, and two other appellants appealed from orders which held Laub guilty of contempt of court and merely reprimanded the other appellants. Laub was a citizen and resident of the State of New York, who was served with the *subpoena ad testificandum* in New York City in this suit, which was before the District Court for the District of Connecticut. He appeared at the hearing in response to the subpoena, but the jurisdic-

tional point was reserved. The order of the District Court for the District of Connecticut reads:

> "The court finds the said respondent George M. Laub is in contempt for violation of the injunction heretofore issued herein, and it is hereby ordered that the respondent George M. Laub pay into the court for the use of the plaintiff, within —— days of the entry of this order, the sum of $500, and that, when paid, *it be paid over to the plaintiff, the McCall Company, as a compensation for its time and outlay in prosecuting this application*" (290 Fed. 365, 366). (Italics ours.)

Laub was served with no process in Connecticut and only the aforementioned *subpoena ad testificandum* in the State of New York. Judge Mayer, in the Circuit Court of Appeals for the Second Circuit, held as follows:

> "As to Laub: In view of the fact that Laub was a citizen and resident of New York, process could not be served upon him, and the court could not gain jurisdiction as to him. *Munter* v. *Weil Corset Co., Inc.*, 43 Sup. Ct. 347, 67 L. Ed. ——, decided February 26, 1923. * * * While the order, quoted supra, is in this respect somewhat confused, we are satisfied that it preserved the jurisdictional point, as the court intended it should. This being so, *it is plain that the court was wholly without jurisdiction to entertain any contempt proceeding against Laub*" (pp. 368, 369). (Italics ours.)

It must be noted that as to the other two appellants, the court held the order denying a motion to punish them for contempt (but which instead reprimanded them) a final order from which they could appeal. As to Laub, no mention of finality is made but under accepted doctrine, the Circuit Court of Appeals could

not have reversed if it had not had jurisdiction to hear Laub's appeal. *Western Electric Co., Inc. et al.* v. *Pacent Reproducer Corp., supra.* Hence, this case is squarely in point with the one at bar, in that the petitioner, just as Laub, appealed to the Circuit Court of Appeals because there was no jurisdiction over the person to punish him for contempt.

POINT E.

As the orders of the District Court, dated December 19, 1935, and February 7, 1936, are dual in nature, being final as to the $10,000 ordered paid to the respondent's attorneys, the Circuit Court of Appeals has jurisdiction to hear the appeal.

Assuming but not conceding that an order punishing a party for contempt of court is not appealable, unless it be for criminal contempt of court or after a final decision in an equity suit for an injunction, and thus finality must rest on some other doctrine, if there is a part of the order which is sufficient to ground an appeal, the Circuit Court of Appeals can hear the whole case; especially is that true as to jurisdiction in that it must inquire as to the jurisdiction of the district court before it hears anything as to the merits.

This proposition is found in the decision of *Potter* v. *Beal* (C. C. A. 1, 1892), 50 Fed. 860, in which the court held that the determination of the District Court "is governed by the essence of what is done, and not by the appellation given to it". This means, in relation to the present case, that despite the fact it is a contempt order, if a substantial right or if a question of the power of the court to do a certain thing is raised, the court has jurisdiction to hear the appeal regardless of what the order is entitled, and once the court

has jurisdiction to hear the appeal, it may decide the issue as it should have been decided in the court below. Accord, as to interpreting an order according to its "essence", *The Attualita* (C. C. A. 4, 1916), 238 Fed. 909, wherein the court held:

> *"The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on consideration of the essence of what is done by the decree. Potter* v. *Beal, et al.,* 50 Fed. 860, 2 C. C. A. 60" (pp. 910, 911). (Italics ours.)

In *Brownson* v. *United States* (C. C. A. 8, 1929) 32 Fed. (2d) 844, the District Court ordered the appellant to appear and testify in a hearing before an agent of the Commissioner of Internal Revenue and that he stand committed to jail for contempt unless and until he complied with said order to testify. As to the dual nature of the order appealed from, the court held:

> "The order under discussion is, however, dual in its nature. It first *unconditionally* orders the witness to appear and testify and to produce certain papers; it secondly commits the witness to jail conditionally. *We think that for the purpose of determining appealability the first part of the order, which is complete in itself, should alone be considered.* That such an order is appealable we think is established. *Perlman* v. *United States,* 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, 442, 34 S. Ct. 645 (59 L. Ed. 1036); *United States* v. *First National Bank of Mobile* (D. C.) 295 F. 142, affirmed 267 U. S. 576, 45 S. Ct. 231, 69 L. Ed. 796. In the case last cited, the Supreme Court entertained an appeal from an order of the District Court directing

a witness to appear and testify and to produce books and papers in a case very similar to the case at bar. *The affirmance of the order necessarily involved a holding that the order was appealable*" (p. 846). (Italics ours.)

In the instant case, the petitioner likewise contends that the orders of December 19, 1935 and February 7, 1936 are dual inasmuch as they both order a fine and the payment of $10,000 to the attorneys for the respondent in addition to the fine, which payment must be made except upon the forfeiture of the petitioner's liberty. *Hence, that part of the order, unconditionally commanding payment of the aforesaid sum of $10,000 is complete in itself, and thus is a final order sufficient to give the Circuit Court of Appeals jurisdiction to hear the appeal within the doctrine of the Brownson case, supra.*

CONCLUSION.

It is therefore respectfully submitted that the order of the United States Circuit Court of Appeals for the Second Circuit dated March 5, 1936, was erroneously made; that the Circuit Court of Appeals has jurisdiction to hear an appeal from the orders of the United States District Court for the Southern District of New York, dated December 19, 1935 and February 7, 1936, and that this Court reverse the determination of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936, and direct that the appeal be heard upon the merits.

Respectfully submitted,

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